(2)

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

No. 95-64

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

JOHN DAVIS,
*Petitioner,*

v.

STATE OF ALABAMA, et al.,
*Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

## BRIEF OF RESPONDENTS STATE OF ALABAMA, SECRETARY OF STATE, PROBATE JUDGES, SHERIFFS, AND CIRCUIT CLERKS OF ALABAMA IN OPPOSITION TO CERTIORARI

JEFF SESSIONS
Attorney General
WILLIAM H. PRYOR JR.*
Deputy Attorney Gerneral
Office of Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7300
(334) 242-7458 (fax)

* *Counsel of Record*

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

BEST AVAILABLE COPY

65 pp

## QUESTION'S PRESENTED

I. Whether the petitioner has failed to establish special and important reasons for granting a writ of certiorari.

II. Whether the United States Court of Appeals for the Eleventh Circuit was correct in finding the *Rooker-Feldman* doctrine inapplicable, because the plaintiffs were not parties to a collateral state court proceeding and had no opportunity to raise their constitutional claims.

III. Whether the United States Court of Appeals for the Eleventh Circuit was correct in holding that, the State of Alabama, through its judiciary, cannot change retroactively well established election rules and practices to alter the outcome of the last election and thereby rescue the candidacy of the incumbent Chief Justice of the Supreme Court of Alabama.

## TABLE OF CONTENTS

Page

QUESTION'S PRESENTED ..... i
TABLE OF AUTHORITIES ..... iv
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1
STATEMENT OF THE CASE ..... 5
REASONS TO DENY THE WRIT ..... 8
I. This Case Is About Stuffing the Ballot Box. ..... 9
A. The Plaintiffs' Injury is Severe. ..... 10
B. There Can Be No Compelling State Interest in Stuffing the Ballot Box ..... 11

II. The *Rooker-Feldman* Doctrine Is Inapplicable. ..... 12

III. The Decision of the Supreme Court of Alabama Actually Compounded the Plaintiffs' Injury ..... 13
A. The Disqualification Issue. ..... 14
B. The Attempt to Amend Findings of Fact By the Federal Courts. ..... 22
C. The Failure to Certify the Need for a Special Court ..... 24
D. The Unauthorized Discussion of Federal Jurisdiction ..... 25
E. The Egregious Illogic of the Answer ..... 26

IV. Davis Has Not Identified "Special and Important" Reasons to Grant the Writ. ..... 27
CONCLUSION ..... 28
CERTIFICATE OF SERVICE ..... 29
APPENDIX ..... A-1

## TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| *Advertiser v. Hobbie*, 474 So. 2d 93 (Ala. 1975) | 26 |
| *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) | 15 |
| *Anderson v. Celebrezze*, 460 U.S. 780 (1983) | 10 |
| *Brown v. O'Brien*, 469 F. 2d 563 (D. C. Cir. 1972) | 11 |
| *Burdick v. Takushi*, 112 S. Ct. 2059 (1992) | 10 |
| *Clark v. Houston County Comm'n*, 507 So. 2d 902 (Ala. 1987) | 26 |
| *Duke v. Cleland*, 5 F. 3d 1399 (11th Cir. 1993) | 10 |
| *Duke v. Smith*, 13 F. 3d 388 (11th Cir. 1994) | 10 |
| *Duncan v. Poythress*, 657 F. 2d 691 (5th Cir. 1981) | 11 |
| *Ericsson GE Mobile Communication v. Motorola Communications & Electronics*, no. 1931189, slip op., at 2 (Ala. March 17, 1995) | 23 |
| *Fuentes v. Shevin*, 407 U.S. 67 (1972) | 22 |
| *Government and Civic Employees Organizing Committee v. Windsor*, 353 U.S. 364 (1957) | 26 |
| *Griffin v. Burns*, 570 F. 2d 1065 (lst Cir. 1978) | 10 |
| *In re Murchison*, 349 U.S. 133 (1954) | 15 |
| *John Deere Co. v. Gamble*, 523 So. 2d 95 (Ala. 1988) | 26 |
| *Johnson v. Mississippi*, 403 U.S. 212 (1971) | 18 |
| *League of Women Voters v. Renfro*, 292 Ala. 128, 290 So. 2d 167 (1974) | 26 |
| *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) | 17 |
| *Morgan County Board of Education v. Alabama Public School and College Authority*, 362 So. 2d 850 (Ala. 1978) | 26 |
| *Morgan County Commission v. Powell*, 293 So. 2d 830 (Ala. 1974) | 17,18 |
| *Offutt v. United States*, 348 U.S. 11 (1954) | 15 |
| *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) | 9, 11 |
| *Roe v. State of Alabama*, 43 F. 3d 574 (11th Cir. 1995) | 7,8,11,13,19 |

*Taylor v. Hayes*, 418 U.S. 488 (1974) ..... 18
*Tumey v. Ohio*, 273 U.S. 510 (1926) ..... 15
*Tyler v. City of Enterprise*, 521 So. 2d 951 (Ala. 1988) ..... 23
*Tyler v. Insurance Co. of North America*, 520 F.2d 541(5th Cir. 1972) ..... 25
*United States v. Saylor*, 322 U.S. 385 (1941) ..... 11
*Ward v. Village of Monroeville*, 409 U.S. 57(1972) ..... 15

**II. Constitutional Provisions, Statutes, and Rules of Court**

Ala. Code § 12-2-14(1986) ..... 21,24
Ala. Code §17-10-10 ..... 4
Ala. Code §17-10-7 ..... 2,5,26,27
Ala. Code §17-15-6 ..... 19,25
Ala. Const. amend. 328 § 6.02(b)(3) ..... 25
S.Ct. R. 13.4 ..... 9
Supreme Court Rule 10.1 ..... 27
Ala. R. App. P. 18(a) ..... 25

**III. Other Authorities**

Alabama Election Handbook (6th ed. 1994) ..... 5
Atty. Gen. Op. No. 80-551 ..... 5

# No. 95-64

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

---

JOHN DAVIS,
*Petitioner,*

v.

STATE OF ALABAMA, et al.,
*Respondents.*

---

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

## BRIEF OF RESPONDENTS STATE OF ALABAMA, SECRETARY OF STATE, PROBATE JUDGES, SHERIFFS, AND CIRCUIT CLERKS OF ALABAMA IN OPPOSITION TO CERTIORARI

Respondents The State of Alabama, Secretary of State, Probate Judges, Sheriffs, and Circuit Clerks of Alabama respectfully request that this Court deny the Petition for Writ of Certiorari filed by John Davis.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in pertinent part,"Congress shall make no law ... abridging the

freedom of speech, or of the press; or the right of the people to assemble; and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution states, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law ...."

Section 17-10-7 of the Code of Alabama provides as follows:

> Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:
>
> "State of Alabama
> "County of _____
> "I, the undersigned, do swear (or affirm) that:
> "(1) I am a resident of _____county in the state of Alabama.
> "(2) My place of residence in Alabama is _____ .
> (street)
> _____ , Alabama _____
> (city or town) (zip code)
> "(3) My voting precinct (or place where I vote) is
> _____
> "(4) My date of birth is: _____
> month day year
> "(5) I am entitled to vote an absentee ballot because:
> Check only one:
> ___ I have moved from Alabama less than thirty days prior to the election.
> ___ I will be out of the county or the state on election day.
> ___ I am physically incapacitated and will not be able to vote in person on election day.

"I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains. "I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions. "Moreover, I further swear (or affirm) that all of the information given above is true and correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and-or confinement in the county jail for not more than six months.

_____
(Signature or mark of voter)

"Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older. "Sworn to and subscribed before me this ___day of 19___. I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

_____ (Signature of official)
(Title of official)

_____
Address of official

**OR**

"lst Witness

_____
Signature

_____
Print name

_____
Address

_____
City Zip Code

"2nd Witness

_____
Signature

_____
Print name

_____
Address

_____
City Zip Code"

Section 17-10-10 of the Code of Alabama provides as follows:

> Upon receipt of the absentee ballot, the absentee election manager shall record its receipt thereof on the absentee list as provided in section 17-10-5 and shall safely keep the ballot without breaking the seal of the affidavit envelope. On the day of the election, beginning at 12:00 noon, the absentee election manager shall deliver the sealed affidavit envelopes containing absentee ballots to the election officials provided for in section 17-10-11, and such election officials shall call the name of each voter casting an absentee ballot with poll watchers present as may be provided under the laws of Alabama and shall open each affidavit envelope, review the affidavit to certify that such voter is entitled to vote and deposit the plain envelope containing the absentee ballot into a sealed ballot box. The absentee ballots shall upon the closing of the polls be counted and otherwise handled in all respects as if the said absentee voter were present and voting in person. As regards municipalities with populations of less than 1,000, in the case of municipal elections held at a time different from a primary or general election, such return mail envelopes containing the ballots shall be delivered to the election official of the precinct of the respective voters.

## STATEMENT OF THE CASE

This case is about an attempt by state court judges to change retroactively fundamental election laws and practices and thereby rescue the election of the incumbent Chief Justice of the Supreme Court of Alabama. After it became apparent that the 1994 race for Chief Justice would be decided by a razor-thin margin and the incumbent Chief Justice defeated, the executive director of the Alabama Trial Lawyers Association urged the Secretary of State to order the inclusion of unwitnessed absentee ballots in the certified election results. (Dist. Ct. Tr., at 80). The Secretary of State refused.

Section 17-10-7 of the Alabama Code provides "Each absentee ballot *shall* be accompanied by an envelope upon which *shall* be printed an *affidavit*.... Note: Your signature *must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." Ala. Code § 17-10-7 (added emphasis). The last sentence is printed, along with signature lines for a notary and witnesses, on the envelope of every absentee ballot distributed to voters by state election officials. (See exhibit A to this Brief.) The record is undisputed that the 1994 election handbooks distributed by the Secretary of State to probate judges, sheriffs, circuit clerks, members of the legislature, political parties, candidates, and voters stated as follows:

> All persons voting by absentee ballot must have their ballots notarized by a notary public or anyone authorized to notarize documents or two witnesses 18 years of age or older. Otherwise, the ballot will not be counted.

Alabama Election Handbook, at 50 (6th ed. 1994)(attached to this Brief as exhibit B). In addition, for many years, the Attorney General of Alabama advised state election officials that unwitnessed absentee ballots must not be counted. Atty. Gen. Op. No. 80-551 (letter to J. Floyd, Clerk and Register of Court,

Carrollton, Alabama, Sept. 12, 1980) (attached to this Brief as exhibit C). The record, as developed when the preliminary injunction was entered and as confirmed in recent discovery, shows that the uniform and longstanding statewide practice of election officials has been not to count unwitnessed absentee ballots.

A day or two after the Secretary of State refused to include unwitnessed absentee ballots in the certified vote totals, Michael Odom and John Davis sued the Secretary of State and demanded that state election officials count unwitnessed absentee ballots in the race for Chief Justice. (Dist. Ct. Tr., at 81). Messrs. Odom and Davis, represented by members of the Alabama Trial Lawyers Association and allies of the incumbent Chief Justice, alleged that, based on the instructions of the Secretary of State, election officials throughout the State had excluded thousands of unwitnessed absentee ballots from certified results of the election. *Odom v. Bennett,* no. 94-2434. The Circuit Court of Montgomery County nevertheless ordered the inclusion of unwitnessed absentee ballots in the election results after hearing *undisputed* testimony from state officials that unwitnessed absentee ballots have regularly been excluded by election officials.

No voter, candidate, or official filed any suit before the 1994 election to require counting of unwitnessed absentee ballots, even though the Secretary of State had published clear instructions for voters and election officials that these defective ballots would not be counted. Similarly, no one sought a new Attorney General opinion on this issue before the election. This purported need to "enfranchise" voters arose *a week after the election* when the candidacy of the incumbent Chief Justice appeared to be in jeopardy.

On November 18, 1994, the United States District Court for the Northern District of Alabama enjoined the enforcement of the *Odom* order, because the order constituted a change in

election laws that had not been precleared under section 5 of the Voting Rights Act, 42 U.S.C. §1973c. *Bradford v. State of Alabama,* no. 94-PT-2816-M (copy of order attached as exhibit D to this Brief). On November 22, 1994, the three judge court in *Bradford* dissolved that in junction upon receipt of a preclearance letter dated November 22, 1994, from the United States Attorney General. In a later opinion, Judge Robert Propst wrote that the jurisdiction of the district court was limited, under the Voting Rights Act, but that he was "repulsed" by the events at issue. (Opinion attached as exhibit E to this Brief.)

After hearing undisputed testimony from state officials, including the Secretary of State, that unwitnessed absentee ballots have been regularly excluded from election results, the United States District Court for the Southern District of Alabama entered a preliminary injunction on December 5, 1994, that the retroactive change of election law by the Circuit Court of Montgomery County violated the federal civil rights of Larry Roe, Perry Hooper, Jim Martin, and other voters of Alabama, under the first and fourteenth amendments. The district court described this attempt to change the election rules as "abominable" and "contemptible." (Dist. Ct. Tr., at 170-71.) On January 4, 1995, the U.S. Court of Appeals for the Eleventh Circuit affirmed and ruled that the change in election laws resulted in "fundamental unfairness" under the first and fourteenth amendments. *Roe v. State of Alabama,* 43 F. 3d 574 (11th Cir. 1995). The Eleventh Circuit, however, in the interest of comity, certified the question of state law whether to count unwitnessed absentee ballots to the Supreme Court of Alabama. On January 17, 1995, Davis filed a petition for rehearing. The Eleventh Circuit denied Davis's petition for rehearing on February 23, 1995, and Davis did not seek timely review of that order in this Court. When the Supreme Court of Alabama answered the certified question in the affirmative, the Eleventh Circuit on April 26, 1995, remanded this proceeding for a final and speedy

trial and issued the mandate forthwith. *Roe v. State of Alabama*, 52 F. 3d 300 (11th Cir. 1995). On May 26, 1995, Circuit Justice Anthony Kennedy denied Davis's application for a stay pending the filing of a petition for writ of certiorari. Since then, extensive discovery has taken place, and a trial of the plaintiffs' request for a permanent injunction has been scheduled for September 19, 1995, if necessary. Both the plaintiffs and State defendants have moved for summary judgment against John Davis, and those motions have been submitted to the district court.

## REASONS TO DENY THE WRIT

Ordinarily, the Attorney General of Alabama must defend the constitutionality of rulings of the courts of Alabama, but this case is different (and hopefully *sui generis*). The Attorney General cannot defend the orders of the state courts at issue without violating his oath of office to uphold the Constitution and laws of the United States and the State of Alabama and his ethical obligation of candor to this Court. Unfortunately, the decisions of the state courts make intervention by the federal courts necessary and even raise additional concerns about the violation of the plaintiffs' civil rights. Simply put, the rulings of the courts of Alabama threaten the integrity of the electoral process.[1]

The State of Alabama and all State defendants oppose the petition of John Davis on four grounds. This Brief addresses each of these four objections in separate parts. Part one explains why the plaintiffs' injury is severe and cannot be justified by a compelling governmental interest. Part two explains how the

---

[1] John Davis complains that this litigation has prevented the certification of the election of the Chief Justice, but Davis fails to mention that *his* insistence on continuing this litigation is the *only* obstacle to certifying the election results. The plaintiffs and all other defendants are prepared to resolve this matter immediately. Their refusal to surrender this matter to Mr. Davis does not give rise to a basis for reversing the considered judgments of the district court and the Eleventh Circuit.

*Rooker-Feldman* doctrine was correctly analyzed by the Eleventh Circuit. Part three addresses how the federal courts sought to defer to the State of Alabama, but the state judiciary actually compounded the violation of the plaintiffs' civil rights. Part four addresses how the petitioner has failed to identify special and important reasons for granting the writ.[2]

## I. This Case Is About Stuffing the Ballot Box.

"[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The rulings of the state courts that unwitnessed absentee ballots must by counted (in a desperate attempt to rescue the election of the incumbent Chief Justice) crystallized the plaintiffs' constitutional claim. The review of that claim by the federal courts involves a two step process:

> ... It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests

---

[2] Davis's petition also appears to be untimely. Supreme Court Rule 13.4 provides as follows: "The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice)." S.Ct. R. 13.4. The petition filed by John Davis challenges the holdings and reasoning of the Eleventh Circuit in its decree of January 4, 1995. That is the only decree of the Eleventh Circuit that addressed the merits of the plaintiffs' complaint and the application of the *Rooker-Feldman* doctrine, both of which John Davis asks this Court to review. These matters were not addressed in the remand order entered with the mandate by the Eleventh Circuit on April 26, 1995. Davis filed a petition for rehearing on January 17, 1995, and that petition was denied by the Eleventh Circuit on February 23, 1995. As to the January 4, 1995, decree, the time for filing a petition for a writ of certiorari expired on May 24, 1995, almost two months before John Davis filed this petition.

> put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiffs' rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional....

*Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983).

This Court has explained that this is a "flexible standard":

> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." ...

*Burdick v. Takushi,* 112 S. Ct. 2059, 2063 (1992); *see also Duke v. Smith,* 13 F. 3d 388 (11th Cir. 1994); *Duke v. Cleland,* S F. 3d 1399 (11th Cir. 1993). The application of that standard in this case is straightforward and uncomplicated.

**A. The Plaintiffs' Injury is Severe.**

As the Eleventh Circuit found in its January 4, 1995, decision, the injury asserted by the plaintiffs - "stuffing the ballot box" - is severe. That Court stated

> We agree that failing to exclude the contested absentee ballots will constitute a post-election departure from previous practice in Alabama. *See Griffin v. Burns,* 570 F. 2d 1065, 1075 (1st Cir. 1978). This departure would have two effects that implicate fundamental fairness and the propriety of the two elections at issue. First, counting ballots that

> were not previously counted would dilute the votes of those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement. *See, e.g., Brown v. O'Brien,* 469 F. 2d 563, 569 (D. C. Cir.), *vacated as moot,* 409 U.S. 816, 93 S. Ct. 67, 34 L.Ed. 2d 72 (1972)....

*Roe*, 43 F. 3d at 581. As this Court held more than thirty years ago, in a case arising from Alabama, "The right to vote can neither be ... destroyed by alteration of ballots ... nor diluted by ballot-box stuffing .... And the right of suffrage can be denied by the debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. at 555; *see also United States v. Saylor*, 322 U.S. 385 (1941). This severe injury cannot be tolerated absent a compelling governmental interest.

**B. There Can Be No Compelling State Interest in Stuffing the Ballot Box .**

The State of Alabama concedes that it cannot assert any interest to justify the rulings of the courts of Alabama. Any interest in "enfranchising voters" is belied by the absence of any authenticity of the contested absentee ballots and the countervailing concern of disenfranchising those who would have voted but for the witness requirement. In addition, stripping the state absentee ballot laws of the witness requirement can only worsen the undisputed abuse of absentee ballots that has long existed in Alabama. *See Roe*, 43 F. 3d at 581 n. 13. "[T]he very integrity of the election process" requires that the unwitnessed absentee ballots not be counted. *Duncan v. Poythress,* 657 F. 2d 691, 703 (5th Cir. 1981). Compounding this problem is the fact

that the purported interest advanced by the Alabama judiciary came to light only after all ballots had been cast in the general election and it became apparent that the election of the incumbent Chief Justice was in jeopardy. The only constitutional context for this purported interest in "enfranchising voters" is a prospective application where all the candidates and voters know the rules well in advance of the election.

Clearly, "federal relief [is proper] where broad-gauged unfairness permeates an election even if derived from apparently neutral action." *Griffin*, 570 F. 2d at 1077. Condoning the stealing of a statewide election cannot be disguised as "enfranchising voters." If a federal court must abstain from remedying this injury, then the first and fourteenth amendments are hollow guarantees for the voters of Alabama.

**II. The Rooker-Feldman Doctrine Is Inapplicable.**

John Davis's argument that the *Rooker-Feldman* doctrine bars the preliminary injunction entered by the district court and affirmed by the Eleventh Circuit fails. As the Eleventh Circuit held, it is undisputed that the plaintiffs were not parties to the state court litigation. 43 F. 3d at 580. "Second, because the plaintiffs were not parties to the circuit court action, the plaintiffs had no opportunity to raise their constitutional claims in the circuit court and their claims, therefore, were not considered by the circuit court." *Id.* Indeed, the violation of the plaintiffs' civil rights did not occur until the State court ordered state election officials to change the rules of the election. Davis would have this Court hold that, if a state court violates the federal civil rights of voters who are not parties to the state court action, those voters must seek relief from the state court that violated their civil rights. Davis would shut the doors of the federal district courts to the violation of federal civil rights by state court decrees in cases where the injured person had no opportunity to raise his claim.

Davis erroneously argues that this case is different because the Alabama Republican Party intervened in the state court litigation and the intervenor's attorney later served as *one* of the attorneys for the plaintiffs in this case, even though the constitutional issues were not raised in the state court suit. Davis cites no authority for this breathtaking, expansive view of the *Rooker-Feldman* doctrine, which equates clients with one of their attorneys in a separate proceeding where the client is not a party. Davis does not cite any authority for the proposition that a political party has standing to complain about the violation of these plaintiffs' civil rights, and Davis does not cite any authority that equates a political party with all of its members for purposes of *Rooker-Feldman*, res judicata, or any similar doctrine. The bottom line is that these plaintiffs were not parties to the state litigation; the state court violated their civil rights; the claims of these plaintiffs were not submitted to the state court; and these undisputed facts make the *Rooker-Feldman* doctrine inapplicable.

## III. The Decision of the Supreme Court of Alabama Actually Compounded the Plaintiffs' Injury.

Davis erroneously argues that federal intervention is improper because the State's highest court has since ruled that unwitnessed absentee ballots must be counted. By certifying the question of state law to the Supreme Court of Alabama, the Eleventh Circuit reasonably sought to "accommodate Alabama's interest in having its high court settle the question whether a notarization or the signatures of two witnesses is required before an absentee ballot may be counted." *Roe v. State of Alabama,* 43 F. 3d 574, 583 (11th Cir. 1995). The Eleventh Circuit did so because "federal courts should refrain from holding a state election law unconstitutional when a reasonable alternative cause of action exists." *Id.*, at 582. If the Supreme Court of Alabama had followed the plain language of the Code of Alabama and held that unwitnessed

absentee ballots cannot be counted under Alabama law or made its ruling prospective only, the plaintiffs' claims would have become moot and federal court intervention would now be unnecessary. That did not happen, however.

Unfortunately, the Answer of the Supreme Court of Alabama (the Answer) worsened the severity of the plaintiffs' injury. The Answer is internally inconsistent and was decided in violation of traditional notions of fair play and substantial justice in the following general areas: (1) the refusal of certain members of the Court to recuse themselves; (2) the unprecedented attempt to revise the findings of fact by the federal courts; (3) the failure to certify the need for a special court as mandated by Alabama law; (4) the unauthorized and unsolicited discussion of federal jurisdiction; and (5) the egregious illogic of the decision on the merits. The plaintiffs' objections on these grounds heightens the need for swift justice from the federal courts.

**A. The Disqualification Issue.**

The refusal of certain members of the Supreme Court of Alabama to recuse themselves raised new issues of constitutional concern:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that"every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

> *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United* States, 348 U.S. 11, 14.

*In re Murchison*, 349 U.S. 133, 136 (1954); *see also Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (where the mayor's executive responsibilities gave him a "partisan" interest in maintaining a high level of contributions from fines collected in his court). This issue, of course, is not new for cases involving the Supreme Court of Alabama. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (where this Court vacated an opinion of that court for the failure of a member to recuse himself).

Disqualification of all but one member of the Supreme Court was required both by extrajudicial matters and by the determination by the Supreme Court itself. The issue of recusal was raised first by a member of the Supreme Court, Justice Houston, on January 20, 1995. Justice Houston recused himself because he had contributed $500 to the campaign of the Chief Justice. The plaintiffs then filed their motions for recusal on January 27, 1995, and February 15, 1995. The Attorney General filed a response and objection on the issue on March 1, 1995. The application for rehearing filed by the Attorney General on March 24, 1995, which was stricken by the Supreme Court of Alabama on March 31, also raised issues regarding disqualification.

Disqualification was required, as a matter of federal constitutional law, for six members of the Supreme Court, as a result of two general extrajudicial matters. First, the undisputed record shows that, of the seven members of the Supreme Court who did

not recuse themselves, three had made substantial cash contributions to the campaign of the incumbent Chief Justice. These political contributions were to an interested person in a case involving his candidacy where his opponent is a litigant. Second, the undisputed record shows that three other members of the Court had campaigned actively on a political ticket with the Chief Justice in the November general election; received substantial contributions from the law firm in which the son of the Chief Justice is a named partner; received substantial contributions from the lawyers representing John Davis in this litigation; and will have their vote totals affected by the outcome of this litigation. Two of these three members also shared political and polling consultants with the Chief Justice in the November election, and one of the two made well publicized and highly critical comments about the entire Republican ticket for the Court, which included plaintiff Hooper. The third member's campaign manager also contributed $1,000 to the campaign of the Chief Justice.

Apart from these extrajudicial matters, the Answer itself also raised three issues of the need for disqualification. First, on March 17, 1995, the Alabama Judicial Inquiry Commission responded to Justice Butts's commendable request for an advisory opinion on this issue and stated that, despite the decision of this Court, Justice Butts should

> recuse [him]self from any future participation in the above referenced case. The Commission bases its recommendation on the totality of the circumstances with special focus on the apparent interrelationship of your campaign with that of the incumbent Chief Justice. The Commission views recusal as especially appropriate not only due to the above factors but also because of the climate surrounding the 1994 Alabama elections.

(See exhibit F.)

Although the Commission apparently considered itself bound, as a matter of *stare decisis*, by the one day earlier decision of the Supreme Court, the Commission stated, with the following quotation, that Alabama law demands the appearance of justice:

> The appearance of fairness is virtually as important as is fairness itself. One of the essential ingredients of an effective judiciary is the high level of respect accorded it by the citizenry. Except for the impartiality of those who occupy the role of judge, both in act and appearance, the level of respect necessary to a strong and effective judiciary will fail. It is the essence of the system that any position of interest or bias is sufficient cause for disqualification of the judge, and *the right to raise and insist upon the causes of disqualification must be zealously guarded.*

*Morgan County Commission v. Powell*, 293 So. 2d 830, 840 (Ala. 1974)(emphasis added).

The Supreme Court ruled on the disqualification issue one day before the Judicial Inquiry Commission met, and Justice Maddox stated that the decision of the court was released in a hurried manner, as he was given only four hours' notice to prepare his dissent. Justice Kennedy, who did not vote but sat on this case and is a member of the Commission, was presumably aware of the related timing of these events. Justice Maddox also mentioned in a supplemental dissent that the Court did not discuss this case in a conference as is customary. These facts only diminished the appearance of justice in this matter.

The second matter concerns the animosity displayed in the Answer toward the plaintiffs, their attorneys, and the federal courts. It is well-established that a judge can become so "personally embroiled" in a dispute with a lawyer, litigant, or other participant that it requires disqualification and raises issues under the due process clause of the fourteenth amendment. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Johnson*

*v. Mississippi*, 403 U.S. 212 (1971); *Taylor v. Hayes*, 418 U.S. 488 (1974). "Trial before 'an unbiased judge' is essential to due process." *Johnson*, 403 U.S. at 216.

The Answer creates concern about animosity toward the participants in several respects. In the determination of the disqualification issue itself, the Answer stated that the timing of the motion filed by the plaintiffs' attorneys "approaches unacceptable conduct. It is certainly conduct indicating a lack of understanding of a lawyer's responsibility as an officer of this Court and of the Eleventh Circuit Court of Appeals, if not indicating an outright disrespect for both courts." Answer at 60. This statement cannot be squared with the precedent of the Supreme Court that "the right to raise and insist upon the causes of disqualification must be zealously guarded." *Morgan County*, 293 So. 2d at 840.

The Supreme Court also harshly criticized attorney Algert Agricola for his strategy in not appealing the preliminary injunction entered in *Odom*:

> ... Although Mr. Agricola gave oral notice of appeal in open court, he never filed a notice of appeal. Under Alabama law, an appeal will lie if filed within 14 days after an order granting a preliminary injunction. Had the Republican Party appealed from the order of the Circuit Court of Montgomery County issued in November, 1994, the entire controversy involving the November general election would have been resolved long ago. The people of Alabama would have known the outcome of the election, and the losing candidates had they chosen to do so, could have contested the election in the state legislature.
>
> Counsel for the Republican Party, Algert S. Agricola, Jr., for "strategic reasons," decided that it was in the best interests of his clients, the Republican candidates, Hooper and Martin, to seek relief in a federal forum. Those candi-

> dates, along with Larry Roe (a voter who voted for these Republican candidates), filed a complaint in U.S. District Court for the Southern District of Alabama in Mobile. The plaintiffs were represented by Albert L. Jordan, Joseph S. Johnston, and J. Michael Druhan. Mr. Agricola subsequently joined these lawyers as counsel for the Republican candidates....

Answer, at 5-6. A contrary argument could be made, however, that the Supreme Court of Alabama could have brought about a quick resolution of this matter by exercising its power to superintend the circuit court based on its lack of subject matter jurisdiction. [3] Blaming the delay of this matter on the attorneys for one side did not serve the appearance of impartiality. Instead, the Supreme Court of Alabama proved that Mr. Agricola's client would have been wasting its time had it appealed the state law issue to that court.

The Supreme Court also reviewed *sua sponte* the relationships of the plaintiffs to their political party, stating as fact matters that are not in the record and challenging the determination of the *Rooker-Feldman* doctrine by the Eleventh Circuit:

> The Republican plaintiffs seek to evade the *Rooker-Feldman* doctrine on the grounds that it is not they, but their party, that intervened in *Odom v. Bennett*. This argument has no merit. The interests of these Republican candidates are identical to the interest of the Republican Party and to permit them to evade *Rooker-Feldman* on this basis would destroy it. In addition to having the same lawyers, the plaintiffs have the closest possible relationship to the Republican Party. They are executive officers of the Republican Party.

---

[3] As Justice Maddox explained in his dissent, the jurisdictional bar is clear. Ala. Code §17-15-6 (1987); *Parker v. Mount Olive Fire & Rescue District*, 420 So. 2d 31, 33 (Ala. 1982).

Answer, at 26-27. Ironically, the Supreme Court of Alabama, however, did not see any common interest or close relationship between the Chief Justice and the other members of that court, who are all fellow Democrats and some of whom ran on the same ticket in the same election; nor did the Court see any irony in invoking the *Rooker-Feldman* doctrine while reviewing the opinion of the Eleventh Circuit on issues of federal law.

The Supreme Court also did not retreat from criticizing the federal courts in this matter:

> By issuing and upholding an injunction in this case, the federal courts have violated the basic tenets of federalism and the longstanding rule against interference by federal courts in state election matters....
>
> Our certification procedures assume that any federal court certifying a question to this Court has jurisdiction of the underlying cause and that the answer to the question is determinative of the cause. The procedure providing for certified questions was adopted to further the return to federalism in this country. Those who drafted the rule, a group including several present members of this Court never imagined that the federal courts would assume jurisdiction of a case previously decided by a state court, invalidate the order of the state court, ignoring federal precedent in doing so, and then have another federal court, on an appeal from a preliminary injunction — where the parties had no notice that the hearing would be on the merits and which is, at best, entered on an incomplete record — ask this Court to answer a question of state law, stating at the same time that the answer of this Court will not be considered in that federal appellate court, no matter what the answer is, in determining the case.

Answer, at 28-29. Apparently, the Supreme Court did not appreciate the effort of the Eleventh Circuit not to intrude unnecessarily into the state election.

These extraordinary criticisms of the plaintiffs, the lawyers, and the federal courts call into question the appearance of justice in this matter. They suggest that members of the Supreme Court of Alabama became too embroiled in this controversy. With all respect, the Answer reads more like a brief than a judicial opinion.

The third matter regarding disqualification relates to the several irregularities of the actual decision on the disqualification issue. First, the Answer stated that the disqualification issue should have been raised first in the Eleventh Circuit, but that is entirely contrary to logic, precedent, and the opinion of the Supreme Court that the federal courts should not have heard any aspect of this case. John Davis has argued that the federal courts cannot address this issue, but the issue of due process under the fourteenth amendment is clearly within the jurisdiction of the federal courts. In the certified question procedure, the federal courts are the next proper place to raise this issue. Second, when the Supreme Court ruled that the disqualification issue should have been raised in the federal courts before certification, the court failed to consider that there was an adequate remedy, under state law, to cure the disqualification problem. Section 12-2-14 of the Code provides for the appointment of a special court by the Governor when the number of justices competent to hear the case falls below six. Third, the Supreme Court stated that the plaintiffs' attorneys inappropriately raised the disqualification issue, but in fact the members of that court have a duty to raise the issue on their own initiative. Fourth, the Supreme Court stated that the disqualification issue was raised after the briefing schedule, but the record shows that the issue was raised before any briefs were filed and all papers on disqualification were filed before the close

of the briefing schedule. [4] Fifth, and somewhat incredibly, the Supreme Court stated that the disqualification issue was not raised until "the decision of this Court was in draft form and was literally ready for release within days." If this statement is true, then it means that the court drafted its opinion *before* the attorneys submitted their arguments.

The disqualification question was not close, but four members of the Supreme Court of Alabama still got it wrong. This Court cannot countenance this deprivation of due process. To remedy this violation of the plaintiffs' civil rights, this Court must not give retroactive effect to the Answer.

**B. The Attempt to Amend Findings of Fact By the Federal Courts.**

By ordering the Circuit Court of Montgomery County to certify its incomplete record in *Odom v. Bennett* to the Supreme Court, which in turn certified the record to the Eleventh Circuit, the Supreme Court deprived the parties of procedural due process.

> For more than a century the central meaning of procedural due process has been clear. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." ... It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." ...

*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citation omitted). The Supreme Court ordered the certification one day before the release of the Answer, and the record certified to the Supreme Court was incomplete. (See exhibit G.) The order directed to the circuit court was entered and mailed to the Attorney General on

---

[4] *See supra* at 15 (regarding the timing of the recusal motions).

March 13 but not received until March 16, two days after the release of the Answer. The Supreme Court considered as dispositive affidavits submitted by the *Odom* plaintiffs in support of their motion for summary judgment, but the circuit court had not even set a hearing of that motion. Furthermore, discovery was not complete, and the parties had not had an opportunity to cross-examine the *Odom* plaintiffs' witnesses. Summary judgment, therefore, would have been premature under Alabama law. *Tyler v. City of Enterprise*, 521 So. 2d 951 (Ala. 1988). The record, as developed in the last month, shows that these affidavits were misleading, deceptively prepared, and in one case false.

By considering the record from the circuit court and transmitting that record to the Eleventh Circuit, the Supreme Court violated well-established rules for certified questions. As that court stated in an opinion by Justice Almon released three days after the Answer, "the certified question procedure does not place this Court in a position of making factual findings." *Ericsson GE Mobile Communication v. Motorola Communications & Electronics*, no. 1931189, slip op., at 2 (Ala. March 17, 1995). The place for factual findings in this matter is the United States District Court for the Southern District of Alabama, and the evidence there, where all parties have been afforded an opportunity to cross-examine the witnesses, is undisputed.

The Supreme Court then used this incomplete record from a separate case as a basis for restating the question certified by the Eleventh Circuit. The Supreme Court stated that the question was whether Alabama law permits "some, but not all," of the contested absentee ballots to be counted. The record in this case, however, provides no basis for this restatement.

**C. The Failure to Certify the Need for a Special Court.**

Under Alabama law, disqualification or recusal of several members of the Supreme Court does not halt the judicial process. The Code of Alabama provides a remedy:

> When by reason of disqualification the number of judges competent to sit in a case is reduced to eight or to six and there is equal division among them on any question material to the determination of the case, the fact shall be certified by the chief justice or, when he is disqualified, by the judges sitting to the governor, who shall thereupon appoint a member of the bar of the supreme court to sit as a judge of said court in the determination of said case. Similarly, when by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the chief justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the governor, who shall thereupon appoint members of the bar of the supreme court to constitute a special court of seven members of the consideration and determination of such case.

Ala. Code § 12-2-14(1986). This statute *mandates* that when the number of justices falls below six a special court *shall* be appointed.

When only five justices voted in this case, the Supreme Court improperly evaded the mandate of section 12-2-14. The parties and the citizens of this State were entitled to the vote of each competent member of the court and the recusal of all others. If neither Justice Kennedy nor Justice Butts could sit on this case, then the statute applied. Instead, the Answer ignores this issue, except in the supplemental dissent of Justice Maddox. This failure to follow clear state rules also constitutes a denial of due process.

**D. The Unauthorized Discussion of Federal Jurisdiction.**

The question certified by the Eleventh Circuit was one of state, not federal, law. Indeed, the Constitution of Alabama limits the jurisdiction of the Supreme Court of Alabama "to answer questions of *state law* certified by a court of the United States." Ala. Const. amend. 328 § 6.02(b)(3)(added emphasis). Alabama Rule of Appellate Procedure 18(a) likewise provides that this process is confined to questions of Alabama law:

> When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of the *law of this State* which are determinative of said cause and there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of *law of this State* to the Supreme Court of Alabama for instructions concerning such questions or propositions of *state law* ....

Ala. R. App. P. 18(a) (added emphasis); *see also Tyler v. Insurance Co. of North America,* 520 F.2d 341, 342 (5th Cir. 1972)("Through certification we can have answers from the Court which under *Erie* has the last word....").

The Supreme Court had neither jurisdiction nor an invitation to address issues of federal law in this proceeding. *County of Westchester v. Commissioner of Transportation*, 9 F. 3d 242 (2d Cir. 1993)(federal court not bound by discussion of federal law by state supreme court). Although state courts often decide issues of federal law in other contexts, they have little or no role or expertise in determining issues of federal court jurisdiction. Strangely, the Supreme Court of Alabama ignored the lack of jurisdiction in the Circuit Court of Montgomery County, under section 17-15-6 of the Alabama Code. When the Supreme Court addressed issues of federal jurisdiction, it exceeded its own

jurisdiction, under the judicial article, and upset the delicate balance of federalism that has been respected by the federal courts in this matter. Throughout this controversy, the federal courts have confined their review to issues of federal constitutional law and the Voting Rights Act, while respectfully deferring to the state courts on issues of Alabama law, as required by Supreme Court precedent. *Government and Civic Employees Organizing Committee v. Windsor*, 353 U.S. 364 (1957).

When the Supreme Court addressed issues regarding federal jurisdiction, that court also failed to give the parties notice and an opportunity to be heard. The issues of federal jurisdiction were not briefed to that court. The first notice given to the parties that the court might address federal jurisdiction was in the Answer itself.

**E. The Egregious Illogic of the Answer.**

In the Answer, the Supreme Court failed to describe any ambiguity in section 17-10-7 and, as Justice Maddox explained, thereby violated the plain meaning rule:

> The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. *Advertiser v. Hobbie*, 474 So. 2d 93 (Ala. 1975); *League of Women Voters v. Renfro*, 292 Ala! 128, 290 So. 2d 167 (1974). If possible the intent of the legislature should be gathered from the language of the statute itself. *Advertiser v. Hobbie.* supra; Morgan *County Board of Education v. Alabama Public School and College Authority*, 362 So. 2d 850 (Ala. 1978)....

*John Deere Co. v. Gamble*, 523 So. 2d 95, 99-100 (Ala. 1988) (quoting *Clark v. Houston County Comm'n*, 507 So. 2d 902, 903-04 (Ala. 1987)). As Justice Maddox reasoned, with inescapable logic, there is no ambiguity in the language that the Legislature

used in section 17-10-7: "Each absentee ballot *shall* be accompanied by an envelope upon which *shall* be printed an *affidavit*.... Note: Your signature *must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." Ala. Code §17-10-7 (added emphasis).

## IV. Davis Has Not Identified "Special and Important" Reasons to Grant the Writ.

Supreme Court Rule 10.1 states that certiorari is strictly a matter "of judicial discretion." The rule also emphasizes, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The rule then outlines several such reasons, none of which are present here.

Davis has not identified any issue worthy of the review of this Court. Davis has not identified a direct conflict with a ruling of this Court, nor a conflict with decisions of federal Circuit Courts, nor a conflict with a holding of a state supreme court. The Eleventh Circuit explained persuasively why its decision is in harmony with the decisions of this and other federal courts, and the only issue before the Supreme Court of Alabama was one of state law. Any factual issues that remain have been remanded to the district court and can be reviewed by the Eleventh Circuit, if necessary.

## CONCLUSION

This case is a tragic and embarrassing episode in the political history of the State of Alabama. The people of Alabama want this case resolved and the results of the election of the Chief Justice known. John Davis should end this litigation and concede that he cannot use state judicial processes to stuff the ballot box. The State defendants, however, urge the federal judiciary to continue exercising its duty to safeguard the civil rights of the voters of Alabama.

For the foregoing reasons, the erroneous Petition of John Davis should be denied.

Respectfully submitted,

JEFF SESSIONS
ATTORNEY GENERAL
WILLIAM H. PRYOR JR.*
DEPUTY ATTORNEY GENERAL
Office of Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(334)242-7300
(334)242-7458 (fax)
*Counsel of Record

## CERTIFICATE OF SERVICE

I certify that I have served by mail a copy of this Brief of Respondents State of Alabama, Secretary of State, Probate Judges, Sheriffs, and Circuit Clerks of Alabama in Opposition to Certiorari on the following attorneys:

*ATTORNEYS FOR PLAINTIFFS*
Albert L. Jordan
B. Glenn Murdock
Wallace, Jordan, Ratliff,
Byers & Brandt
2000 SouthBridge Parkway, Suite 525
Birmingham, Alabama 35209

Joseph S. Johnston
J. Michael Druhan Jr.
Johnston, Wilkins & Druhan
Post Office Box 154
Mobile, Alabama 36601
Algert S. Agricola Jr.
111 Washington Avenue
Montgomery, Alabama 46104

*ATTORNEYS FOR JOHN DAVIS*
Joe R. Whatley Jr.
Samuel H. Heldman
Cooper, Mitch, Crawford,
Kuykendall & Whatley
505 20th Street North
Suite 1100
Birmingham, Alabama 35203

Russell Jackson Drake
Drake & Pierce
1509 University Boulevard
Tuscaloosa, Alabama 35403

Bruce J. McKee
Hare, Wynn, Newell & Newton
The Massey Building
290 21st Street North, Suite 800
Birmingham, Alabama 35203

M. Clay Alspaugh
Hogan, Smith, Alspaugh, Samples & Pratt
2323 2nd Ave. North
Birmingham, Alabama 35203

Dated: _____

_____
OF COUNSEL